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6 DONNA M.,
7 Plaintiff,
8 v.
9 ANDREW S. SAUL,
10 Defendant.

11 Case No. [19-cv-03134-DMR](#)

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17 **ORDER ON CROSS MOTIONS FOR
SUMMARY JUDGMENT**

18 Re: Dkt. Nos. 19, 20

19 Plaintiff Donna M. moves for summary judgment to reverse the Commissioner of the
20 Social Security Administration's (the "Commissioner's") final administrative decision, which
21 found Plaintiff no longer disabled due to medical improvement and therefore terminated her
22 disability benefits under Title II of the Social Security Act, 42 U.S.C. § 401 et seq. [Docket No.
23 19.] The Commissioner cross-moves to affirm. [Docket No. 20.] For the reasons stated below,
24 the court grants Plaintiff's motion in part and denies the Commissioner's motion.

25 **I. PROCEDURAL HISTORY**

26 On February 27, 2005, the Social Security Administration ("SSA") found that Plaintiff was
27 disabled beginning on January 1, 2003. The date of that decision is known as the "comparison
28 point decision" or CPD. Administrative Record ("A.R.") 496-99. At the time of the CPD,
Plaintiff had an anxiety disorder that met listing 12.06 in 20 C.F.R. Subpart P, Appendix 1. A.R.
37.

On July 17, 2013, the Social Security Administration ("SSA") found Plaintiff was no
longer disabled as of July 1, 2013. A.R. 312-15. The determination was upheld on
reconsideration following a December 2013 hearing before a disability hearing officer. A.R. 316-
41.

An Administrative Law Judge ("ALJ") held a hearing in December 2015 and issued an

1 unfavorable decision on January 22, 2016, finding that Plaintiff's condition had improved and that
2 she was no longer disabled as of July 17, 2013. A.R. 289-307. The Appeals Council reversed and
3 remanded the matter, finding that the ALJ should have considered whether Plaintiff became
4 disabled again at any time between July 17, 2013 and March 31, 2016, her "last insured" date.
5 A.R. 308-10. The Appeals Council also found that the ALJ erred in giving "significant weight" to
6 the disability hearing officer's decision, which was not a medical opinion. A.R. 309.

7 The ALJ postponed a second hearing scheduled for October 11, 2017, and held a third
8 hearing on January 29, 2018, at which a medical expert testified. A.R. 251-82. The ALJ issued a
9 second unfavorable decision on March 12, 2018. A.R. 32-55. Following the eight-step analysis
10 that governs continuing disability reviews, the ALJ determined that since July 17, 2013, Plaintiff
11 had depressive disorder, NOS and an anxiety disorder, NOS, which were both severe impairments.
12 A.R. 37, 39. The ALJ found that Plaintiff's CPD impairment of anxiety no longer met or
13 medically equaled listing 12.06, and that starting on July 17, 2013, Plaintiff "has had the residual
14 functional capacity ["RFC"] to perform a full range of work at all exertional levels involving
15 simple, routine tasks with no public interaction." A.R. 39. Relying on the opinion of a vocational
16 expert ("VE") who testified that Plaintiff's nonexertional limitations "had little or no effect on the
17 occupational base of unskilled work at all exertional levels," the ALJ found that a finding of "not
18 disabled" was appropriate. A.R. 45. The ALJ concluded that Plaintiff's disability ended on July
19 17, 2013, and that she had not become disabled again since that date. A.R. 45.

20 After the Appeals Council denied review, Plaintiff sought review in this court. [Docket
21 No. 1.] The parties both move for summary judgment.

22 **II. THE CONTINUING DISABILITY REVIEW PROCESS**

23 An individual is disabled for the purpose of receiving benefits under the Act if she
24 demonstrates a medically determinable physical or mental impairment that prevents her from
25 engaging in substantial gainful activity that is expected to result in death or last for a continuous
26 period of at least twelve months. *Reddick v. Chater*, 157 F.3d 715, 721 (9th Cir. 1998) (citing 42
27 U.S.C. § 423(d)(1)(A)). The impairment must render the claimant incapable of performing the
28 work she previously performed and incapable of performing any other substantial gainful

1 employment that exists in the national economy. *Tackett v. Apfel*, 180 F.3d 1094, 1098 (9th Cir.
2 1999) (citing 42 U.S.C. § 423(d)(2)(A)). To determine whether a claimant is disabled, an ALJ
3 engages in a five-step sequential analysis as required under 20 C.F.R. § 404.1520(a)(4)(i)-(v).

4 After a person is found to be entitled to disability benefits, the Commissioner is required to
5 periodically review whether continued entitlement to such benefits is warranted. 42 U.S.C. §
6 421(i); 20 C.F.R. §§ 404.1589-1590. The SSA may only terminate benefits to an existing
7 beneficiary if substantial evidence demonstrates that 1) there has been medical improvement in the
8 individual's impairment and 2) he or she is now able to engage in substantial gainful activity. *See*
9 42 U.S.C. § 423(f)(1); *Flaten v. Sec'y of Health & Human Servs.*, 44 F.3d 1453, 1460 (9th. Cir.
10 1995) ("Disability benefits cease when the period of disability ends due to medical improvement
11 (or for other reasons) and the individual is again able to do substantial work." (citations omitted)).
12 ALJs make this determination by following an eight-step regulatory framework, which asks:

- 13 1. Is the claimant "engaging in substantial gainful activity"?
- 14 2. Does the claimant's impairment or combination of impairments meet any of the listings
15 in 20 C.F.R. 404 Subpart P, Appendix 1?
- 16 3. Has medical improvement occurred?
- 17 4. If medical improvement has occurred, is the medical improvement related to the
18 claimant's ability to work?
- 19 5. If there has been no medical improvement, do any of the exceptions to medical
20 improvement apply?
- 21 6. Are all of the claimant's current impairments in combination severe?
- 22 7. What is the claimant's residual functional capacity based on the current impairments,
23 and can the claimant still perform past relevant work?
- 24 8. If the claimant cannot perform past relevant work, can he or she perform other work
25 given his or her residual functional capacity?

26 20 C.F.R. § 404.1594(f)(1)-(8).

27 **III. STANDARD OF REVIEW**

28 Pursuant to 42 U.S.C. § 405(g), this court has the authority to review a decision by the

1 Commissioner denying a claimant disability benefits. “This court may set aside the
2 Commissioner’s denial of disability insurance benefits when the ALJ’s findings are based on legal
3 error or are not supported by substantial evidence in the record as a whole.” *Tackett v. Apfel*, 180
4 F.3d 1094, 1097 (9th Cir. 1999) (citations omitted). Substantial evidence is evidence within the
5 record that could lead a reasonable mind to accept a conclusion regarding disability status. *See*
6 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). It is more than a mere scintilla, but less than a
7 preponderance. *See Saelee v. Chater*, 94 F.3d 520, 522 (9th Cir. 1996) (internal citation omitted).
8 When performing this analysis, the court must “consider the entire record as a whole and may not
9 affirm simply by isolating a specific quantum of supporting evidence.” *Robbins v. Soc. Sec. Admin.*, 466 F.3d 880, 882 (9th Cir. 2006) (citation and quotation marks omitted).

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11 If the evidence reasonably could support two conclusions, the court “may not substitute its
12 judgment for that of the Commissioner” and must affirm the decision. *Jamerson v. Chater*, 112
13 F.3d 1064, 1066 (9th Cir. 1997) (citation omitted). “Finally, the court will not reverse an ALJ’s
14 decision for harmless error, which exists when it is clear from the record that the ALJ’s error was
15 inconsequential to the ultimate nondisability determination.” *Tommasetti v. Astrue*, 533 F.3d
16 1035, 1038 (9th Cir. 2008) (citations and internal quotation marks omitted).

17 **IV. ISSUES FOR REVIEW**

18 Plaintiff argues that the ALJ’s determination of her RFC and determination that medical
19 improvement occurred are not supported by substantial evidence because the ALJ erred in
20 weighing the medical evidence; assessing her credibility; and rejecting lay witness testimony. The
21 Commissioner argues that the ALJ’s decision is free of error.

22 **V. DISCUSSION**

23 Plaintiff first argues that the ALJ erred with respect to the medical opinions of Elizabeth A.
24 Whelchel, Ph.D., Steven Sutherland, Ph.D., and Joanne Markle, M.D., and that these errors
25 impacted the ALJ’s assessment of her RFC as well as the determination that medical improvement
26 occurred.

27 **A. Legal Standard**

28 Courts employ a hierarchy of deference to medical opinions based on the relation of the

1 doctor to the patient. Namely, courts distinguish between three types of physicians: those who
2 treat the claimant (“treating physicians”) and two categories of “nontreating physicians,” those
3 who examine but do not treat the claimant (“examining physicians”) and those who neither
4 examine nor treat the claimant (“non-examining physicians”). *See Lester v. Chater*, 81 F.3d 821,
5 830 (9th Cir. 1995). A treating physician’s opinion is entitled to more weight than an examining
6 physician’s opinion, and an examining physician’s opinion is entitled to more weight than a non-
7 examining physician’s opinion. *Id.*

8 The Social Security Act tasks the ALJ with determining credibility of medical testimony
9 and resolving conflicting evidence and ambiguities. *Reddick*, 157 F.3d at 722. A treating
10 physician’s opinion, while entitled to more weight, is not necessarily conclusive. *Magallanes v.*
11 *Bowen*, 881 F.2d 747, 751 (9th Cir. 1989) (citation omitted). To reject the opinion of an
12 uncontradicted treating physician, an ALJ must provide “clear and convincing reasons.” *Lester*,
13 81 F.3d at 830; *see, e.g.*, *Roberts v. Shalala*, 66 F.3d 179, 184 (9th Cir. 1995) (affirming rejection
14 of examining psychologist’s functional assessment which conflicted with his own written report
15 and test results); *see also* 20 C.F.R. § 416.927(d)(2); SSR 96-2p, 1996 WL 374188 (July 2, 1996).
16 If another doctor contradicts a treating physician, the ALJ must provide “specific and legitimate
17 reasons” supported by substantial evidence to discount the treating physician’s opinion. *Lester*, 81
18 F.3d at 830. The ALJ meets this burden “by setting out a detailed and thorough summary of the
19 facts and conflicting clinical evidence, stating his interpretation thereof, and making findings.”
20 *Reddick*, 157 F.3d at 725 (citation omitted). “[B]road and vague” reasons do not suffice.
21 *McAllister v. Sullivan*, 888 F.2d 599, 602 (9th Cir. 1989). This same standard applies to the
22 rejection of an examining physician’s opinion as well. *Lester*, 81 F.3d at 830-31. A non-
23 examining physician’s opinion alone cannot constitute substantial evidence to reject the opinion of
24 an examining or treating physician, *Pitzer v. Sullivan*, 908 F.2d 502, 506 n.4 (9th Cir. 1990);
25 *Gallant v. Heckler*, 753 F.2d 1450, 1456 (9th Cir. 1984), though a non-examining physician’s
26 opinion may be persuasive when supported by other factors. *See Tonapetyan v. Halter*, 242 F.3d
27 1144, 1149 (9th Cir. 2001) (noting that opinion by “non-examining medical expert . . . may
28 constitute substantial evidence when it is consistent with other independent evidence in the

1 record"); *Magallanes*, 881 F.2d at 751-55 (upholding rejection of treating physician's opinion
2 given contradictory laboratory test results, reports from examining physicians, and testimony from
3 claimant). An ALJ "may reject the opinion of a non-examining physician by reference to specific
4 evidence in the medical record." *Sousa v. Callahan*, 143 F.3d 1240, 1244 (9th Cir. 1998). An
5 opinion that is more consistent with the record as a whole generally carries more persuasiveness.
6 See 20 C.F.R. § 416.927(c)(4).

7 **B. Analysis**

8 **1. Dr. Whelchel**

9 Dr. Whelchel performed a comprehensive psychiatric evaluation of Plaintiff on June 17,
10 2013. A.R. 1187-93. Dr. Whelchel interviewed Plaintiff, who appeared to be a reliable historian,
11 reviewed two records, and performed a mental status examination. Dr. Whelchel diagnosed
12 Plaintiff with post-traumatic stress disorder (PTSD), bipolar affective disorder II, panic disorder
13 without agoraphobia, and personality disorder NOS. A.R. 1191. Dr. Whelchel wrote that
14 Plaintiff's psychiatric condition could be expected to improve with active psychotherapy and
15 medication management. A.R. 1191.

16 Based on her examination of Plaintiff, Dr. Whelchel opined that Plaintiff is able to
17 understand, remember, carry out simple one or two step job instructions and is also able to "do
18 detailed and complex instructions." She is moderately impaired in the ability to relate and interact
19 with coworkers and the public; maintain concentration and attention, persistence, and pace;
20 associate with day-to-day work activity; maintain regular attendance in the workplace and perform
21 work activities on a consistent basis; and perform work activities without special or additional
22 supervision. Plaintiff is only mildly impaired in the ability to accept instructions from supervisors.
23 A.R. 1192.

24 The ALJ stated that he accorded "significant weight" to Dr. Whelchel's opinion because it
25 was based on her personal observation and extensive evaluation of Plaintiff and because it
26 occurred around the time of the proposed cessation of disability (July 1, 2013). A.R. 41.

27 As set forth above, the ALJ assessed Plaintiff with an RFC to perform "a full range of
28 work at all exertional levels involving simple, routine tasks with no public interaction." A.R. 39.

1 Plaintiff argues that the ALJ's RFC finding is not based on substantial evidence because it does
2 not accurately capture all of the limitations Dr. Whelchel assessed.

3 In determining a claimant's RFC, an ALJ must consider "all of the relevant medical and
4 other evidence" in the record, 20 C.F.R. §§ 404.1545(a)(3), 404.1546(c), and must consider all of
5 the claimant's "medically determinable impairments," including those that are not severe. 20
6 C.F.R. § 404.1545(a)(2); *Orn v. Astrue*, 495 F.3d 625, 630 (9th Cir. 2007). "[A]n RFC that fails
7 to take into account a claimant's limitations is defective." *Valentine v. Comm'r. of Soc. Sec. Admin.*, 574 F.3d 685, 690 (9th Cir. 2009). Similarly, "[t]he hypothetical an ALJ poses to a
8 vocational expert, which derives from the RFC, 'must set out *all* the limitations and restrictions of
9 the particular claimant.'" *Id.* (citing *Embrey v. Bowen*, 849 F.2d 418, 422 (9th Cir. 1988)).

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11 Here, the limitation to "simple, routine tasks with no public interaction" adequately
12 captures Plaintiff's moderate limitations in concentration, attention, persistence, or pace, as
13 assessed by Dr. Whelchel. *See Sabin v. Astrue*, 337 Fed. Appx. 617, 621 (9th Cir. 2009) (finding
14 ALJ properly assessed medical evidence in determining that despite moderate difficulties as to
15 concentration, persistence or pace, claimant could perform simple and repetitive tasks on
16 consistent basis). It also captures Plaintiff's limitations in interacting with the public, as it restricts
17 her to jobs with no public interaction. However, the RFC does not address the other moderate
18 limitations Dr. Whelchel assessed, such as Plaintiff's ability to relate to and interact with
19 coworkers, associate with day-to-day work activity, maintain regular attendance in the workplace
20 and perform work activities on a consistent basis, and perform work activities without special or
21 additional supervision. A.R. 1192. *See, e.g., Morinskey v. Astrue*, 458 F. App'x 640, 641 (9th
22 Cir. 2011) (ALJ erred by failing to address physician's opinion that the claimant was moderately
23 impaired in the ability to maintain regular attendance, sustain an ordinary routine, and complete a
24 normal work day or workweek without interruption from bi-polar disorder; ALJ's restriction to
25 "low stress" jobs did not encompass said limitations); *Raymond v. Berryhill*, No. 5:17-CV-01112-
26 SHK, 2018 WL 3691842, at *6 (C.D. Cal. Aug. 2, 2018) (restriction to unskilled work did not
27 sufficiently account for "moderate limitations in performing routine work duties and maintaining
28 consistent attendance in the workplace"); *Wiles v. Berryhill*, No. 2:16-cv-09558-GJS, 2017 WL

1 5186333, at *3 (C.D. Cal. Nov. 8, 2017) (limitation to “simple routine tasks with limited public
2 contact” did not account for moderate limitations “accepting instructions from supervisors and
3 interacting with coworkers; performing work activities consistently without special instructions;
4 maintaining regular attendance and completing a normal workday without interruption”).
5 Accordingly, the ALJ’s assessment of Plaintiff’s RFC is not supported by substantial evidence.

6 Importantly, Dr. Whelchel’s opinion was consistent with the other medical opinions in the
7 record regarding Plaintiff’s limitations. For example, medical expert Dr. Sutherland testified at
8 the December 2015 hearing that Plaintiff is moderately limited in her ability to perform activities
9 within a schedule, maintain regular attendance, and be punctual within customary tolerances. He
10 also opined that she is moderately limited in her ability to complete a normal workday and
11 workweek without interruptions from psychologically based symptoms, perform at a consistent
12 pace without an unreasonable number of lengthy rest periods, and respond appropriately to
13 changes in a work setting. A.R. 205-06. The ALJ accorded “great weight” to Dr. Sutherland’s
14 opinion. A.R. 41. The ALJ also accorded “significant weight” to the opinions of the state agency
15 medical consultants, who each opined that Plaintiff is moderately impaired in the ability to
16 complete a normal workday or workweek, get along with coworkers or peers without distracting
17 them or exhibiting behavioral extremes, and respond appropriately to changes in the work setting.
18 A.R. 41, 1351-52, 1406.

19 The ALJ’s RFC assessment also impacted his conclusion that Plaintiff could perform other
20 jobs in the national economy given her RFC. The ALJ posed the following hypothetical to the
21 VE: “assume the capacity for work at all exertional levels but limited to no public interaction and
22 simple, routine tasks” by a “younger individual.” A.R. 277. The VE testified, and the ALJ found,
23 that such limitations would not result in a significant erosion of the unskilled work base, and that
24 the majority of unskilled jobs would still be available to such an individual. A.R. 277, 44-45.
25 This hypothetical ignored the opinions by Dr. Whelchel, Dr. Sutherland, and the state agency
26 medical consultants that Plaintiff would be moderately limited in her ability to complete a normal
27 workday or workweek and the other limitations described above, which the ALJ accepted. “The
28 hypothetical an ALJ poses to a vocational expert, which derives from the RFC, ‘must set out *all*

1 the limitations and restrictions of the particular claimant.”” *Valentine*, 574 F.3d at 690 (citation
2 omitted). When a “hypothetical posed by the ALJ to the vocational expert d[oes] not reflect all of
3 [plaintiff’s] limitations, the expert’s opinion has no evidentiary value and cannot support the
4 ALJ’s decision.” *Embrey v. Bowen*, 849 F.2d 418, 423 (9th Cir. 1988). Therefore, the ALJ’s
5 determination, based on a flawed hypothetical posed to the VE, is not supported by substantial
6 evidence.

7 Finally, to the extent that the ALJ did not include all of the limitations Dr. Whelchel
8 assessed in the RFC because he rejected those portions of Dr. Whelchel’s opinion, he erred,
9 because he failed to set forth any reasons for doing so. *See Lester*, 81 F.3d at 830-31 (an ALJ
10 must provide “specific and legitimate reasons” supported by substantial evidence to discount an
11 examining physician’s opinion).

12 2. Dr. Sutherland

13 Dr. Sutherland testified as a medical expert at the December 2015 hearing. A.R. 201-220.
14 He reviewed the record and noted Plaintiff’s diagnosis of anxiety disorder and possible diagnoses
15 of PTSD, panic disorder, and mood disorder, as well as an isolated reference to personality
16 disorder not otherwise specified. A.R. 201-03. He noted Dr. Whelchel’s January 2013 evaluation,
17 including her assessment of Plaintiff’s functional limitations, and initially opined that Plaintiff
18 “doesn’t seem to meet or equal a listing . . . based on what [he’s] seen in this record . . . as of . . .
19 September, of 2013.” A.R. 203-04.

20 As to her functional limitations, Dr. Sutherland stated at the beginning of his testimony
21 that Plaintiff is moderately limited in her ability to understand and carry out complex tasks,
22 maintain attention and concentration for extended periods, perform activities within a schedule,
23 maintain regular attendance, and be punctual within customary tolerances. He also opined that she
24 is moderately limited in her ability to complete a normal workday and workweek without
25 interruptions from psychologically based symptoms, perform at a consistent pace without an
26 unreasonable number of lengthy rest periods, function with the general public and coworkers, and
27 respond appropriately to changes in a work setting. According to Dr. Sutherland, Plaintiff has
28 only mild limitations in her activities of daily living. A.R. 205-06.

1 On questioning by Plaintiff's counsel, Dr. Sutherland stated that it was "very possible" that
2 limitations in Plaintiff's social functioning are "moderate to marked," particularly when she is
3 under stress. A.R. 209. Dr. Sutherland then listened to Plaintiff testify about her problems with
4 relationships, belief that therapy has not helped her, difficulties with concentration and completing
5 tasks, lack of hope for the future, insomnia, and anxiety. A.R. 210, 213-18. Following her
6 testimony, Dr. Sutherland revised his opinion of Plaintiff's functional limitations, stating that she
7 is "marked[ly]" limited in social functioning and indicating that Plaintiff's medical records do not
8 accurately reflect her functioning:

9 And the—the records don't reflect the intensity I hear in her voice and
10 the anger and the hurt. And it appears that she—as I listen to her
11 today, that she has real difficulty holding on, and I really would guess
12 that she would have difficulty maintaining work, maintaining a job at
13 this point, based on what I've heard today. . . .that's my professional
14 opinion at this point.

15 A.R. 218-19. He then concluded that "if we're giving her the benefit of the doubt," she meets a
16 listing. A.R. 219. Upon further questioning, Dr. Sutherland stated his opinion that if Plaintiff
17 secured employment, she could be absent from work two or three times per month or a certain
18 number of days per month and "could have episodes of being really angry at people and losing
19 work." A.R. 220.

20 The ALJ did not discuss Dr. Sutherland's opinion at length, but stated he accorded it "great
21 weight" because Dr. Sutherland was able to review the entire medical record and consider
22 Plaintiff's testimony; cited specific findings to explain his opinion; and possesses "extensive
23 education and experience" in his field. A.R. 41. However, in a footnote, the ALJ noted that while
24 "Dr. Sutherland had appeared willing to tilt the scale in the claimant's favor based on her
25 testimony and presentation at the hearing, he conceded that the objective record is at odds with
26 that presentation and testimony," and stated that he rejected the portion of Dr. Sutherland's
27 opinion "that [Plaintiff] may be more severely impaired based on what [Dr. Sutherland] perceived
28 that day." According to the ALJ, Dr. Sutherland's opinion was "based on a very limited, isolated
perception based on hearing testimony telephonically, and it is not supported by the objective
evidence of record, as discussed herein." A.R. 41 n.2.

1 Plaintiff argues that the ALJ erred with respect to Dr. Sutherland's opinion in two ways.
2 First, she argues that the ALJ did not account for the moderate limitations Dr. Sutherland assessed
3 in his determination of Plaintiff's RFC. For the same reasons discussed above with respect to Dr.
4 Whelchel's opinion, the court agrees. The ALJ's RFC determination did not properly account for
5 Plaintiff's moderate limitations in her ability to perform activities within a schedule; maintain
6 regular attendance; be punctual within customary tolerances; complete a normal workday and
7 workweek without interruptions from psychologically based symptoms; perform at a consistent
8 pace without an unreasonable number of lengthy rest periods; and respond appropriately to
9 changes in a work setting, even though he accorded this portion of Dr. Sutherland's opinion "great
10 weight." *See* A.R. 205-06. This error also negatively impacted the hypothetical the ALJ posed to
11 the VE for the reasons discussed above.

12 Next, Plaintiff argues that the ALJ erred in rejecting Dr. Sutherland's opinion that Plaintiff
13 is markedly impaired in social functioning, "would have difficulty maintaining work," and could
14 be absent from work two or three times per month and "have episodes of being really angry at
15 people and losing work," opinions he offered after hearing Plaintiff's testimony. Plaintiff
16 contends that if the ALJ had accepted this portion of Dr. Sutherland's opinion, he would have
17 concluded that Plaintiff did not experience medical improvement and has remained disabled since
18 July 17, 2013. Pl.'s Mot. 7. According to Plaintiff, the ALJ did not provide legally sufficient
19 reasons to reject this opinion.

20 In response, the Commissioner does not address this specific argument. He asserts only
21 that the ALJ gave valid reasons for according Dr. Sutherland's opinion "great weight," and notes
22 the ALJ's statement that "the overall record does not support the intensity of symptoms claimed at
23 the hearing." Def.'s Mot. 5-6 (citing A.R. 40-41). The Commissioner does not actually discuss
24 the reasons the ALJ gave for discounting portions of Dr. Sutherland's opinion or address the
25 sufficiency thereof. *See id.*

26 Dr. Sutherland did not examine Plaintiff. Instead, he reviewed the record and listened to a
27 portion of her testimony at the hearing. Therefore, as a non-examining physician, the ALJ could
28 only reject his opinion "by reference to specific evidence in the medical record." *Sousa*, 143 F.3d

1 at 1244. Here, the ALJ stated only that Dr. Sutherland’s “suggest[ion] that [Plaintiff] may be
2 more severely impaired” is “based on a very limited, isolated perception” and “is not supported by
3 the objective evidence of record, as discussed herein.” A.R. 41 n.2.¹ As Plaintiff correctly points
4 out, and the Commissioner does not dispute, the ALJ did not actually identify a specific aspect of
5 the medical evidence which contradicts the limitations described by Dr. Sutherland. Therefore,
6 the ALJ did not satisfy the standard articulated by the Ninth Circuit in *Sousa* for rejecting that
7 portion of Dr. Sutherland’s opinion.

8 The ALJ’s error with respect to Dr. Sutherland’s opinion about Plaintiff’s social
9 functioning likely impacted other areas of the ALJ’s decision. First, the ALJ concluded that
10 medical improvement occurred based on Plaintiff’s symptoms “improv[ing] to mild to moderate
11 levels,” which in turn was based on the medical opinion evidence, including Dr. Sutherland’s
12 opinion. *See* A.R. 39, 40-43.

13 Second, the ALJ’s error regarding Dr. Sutherland’s opinion may have affected his
14 evaluation of Dr. Markle’s opinion. Dr. Markle, who is Plaintiff’s treating psychiatrist, opined
15 that Plaintiff has marked limitations in the ability to get along with coworkers and peers without
16 unduly distracting them or exhibiting behavioral extremes, and is markedly impaired in the ability
17 to accept instructions and respond appropriately to criticism from supervisors, among other
18 marked and moderate limitations. A.R. 2034-37. The ALJ accorded no weight to Dr. Markle’s
19 opinion for several reasons, including “because it is inconsistent with the longitudinal record,”
20 A.R. 42, and elsewhere in his opinion the ALJ stated that Dr. Markle’s opinion was “entirely
21 unsupported.” A.R. 44. However, Dr. Markle’s opinions about Plaintiff’s social functioning are
22 consistent with Dr. Sutherland’s improperly-rejected opinions on that subject. Accordingly, on
23 remand, the ALJ shall re-evaluate Dr. Markle’s opinions in light of this consistency with other
24 medical opinion evidence.

25 The ALJ’s errors in evaluating the medical opinion evidence are sufficient to grant
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27
28 ¹ The court also notes that the ALJ’s characterization of this portion of Dr. Sutherland’s opinion as
merely a “suggestion” is not supported by Dr. Sutherland’s testimony that he was “mov[ing] [his]
rating . . . up to marked on the social functioning.” A.R. 218.

1 Plaintiff's motion for summary judgment. Accordingly, the court need not address Plaintiff's
2 remaining claims of error.

3 **VI. CONCLUSION**

4 For the foregoing reasons, Plaintiff's motion for summary judgment is granted in part.
5 This matter is remanded for further proceedings consistent with this opinion.

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7 **IT IS SO ORDERED.**

8 Dated: November 2, 2020

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United States District Court
Northern District of California

